Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	Joseph Hickey
Respondent:	Canada Employment Insurance Commission
Representative:	Dani Grandmaître

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (483650) dated June 17, 2022 (issued by Service Canada)

Tribunal member:	Nathalie Léger
Decision date:	April 7, 2023
File number:	GE-22-2365

Decision

[1] The Amended Charter Challenge Notice (Amended Notice) filed by the Appellant does not meet the requirements to raise a constitutional issue before the Social Security Tribunal of Canada (Tribunal).

[2] The Appellant's appeal will now continue as a regular appeal.

Overview

[3] Even if the case is still in the early stage of adjudication, important and complicated legal issues are already at play. In this interlocutory decision, I will rule on only one thing: the sufficiency of the Amended Notice of constitutional question filed by the Appellant.

[4] This Charter challenge is substantially different from the ones that are regularly brought before the Tribunal. Here, the Appellant is not claiming that one of his specific rights protected by the *Canadian Charter of Rights and Freedom* (Charter) has been violated, but that the term "misconduct", found in sections 30(1) and 31 of the *Employment Insurance Act* (Act), is unconstitutionally vague based on the doctrine of vagueness.

[5] I will start by explaining what the purpose of section 1(1) of the *Social Security Tribunal Regulations*[1] (Regulations) is and why I think that a more thorough evaluation is needed. I will then explain the evolution of the notices submitted by the Appellant. I will go on to present the arguments of both parties on the question of the use of the rule of law to constitutionally challenge a section of the Act and will give my analysis of those arguments. I will end this decision on the question of the sufficiency of the Amended Notice submitted by the Appellant in this very particular case.

[1] *Social Security Tribunal Regulations*, 2022 (SOR/2022-255). This new Regulations came into force on December 5, 2022.

I- Purpose of Subsection 1(1) of the Regulations

[6] The obligation to file a Notice when challenging the constitutionality of a section of the Act is not something unique to the Social Security Tribunal.[2] It is an obligation that exists for most courts and tribunals because it gives the Attorney General[3] the possibility to defend a law that was passed by elected officials.[4] It is part of the constitutional balance that needs to be maintained between the judiciary powers and the parliamentary sovereignty. It also provides an opportunity to assess whether there is a sufficient factual basis and a constitutional argument that is not moot or frivolous.

[7] At the time the Appellant filed his appeal and his first Notice, the Regulations had not been replaced yet. The obligation to file a Notice when constitutionally challenging a section of the Act and other matters relating to a constitutional challenge were then found at section 20 of the Regulations[5]. A new Regulations came into force on December 5, 2022. Because this is before the Appellant filed his Amended Notice, I must apply the "new" Regulations.[6]

[8] Subsection 1(1) of the Regulations reads as follows:

> 1 (1) A party who wants to challenge the constitutional validity, applicability or operability of a provision of the *Canada Pension Plan*, the *Old Age Security Act,* the *Employment Insurance* Act, Part 5 of the *Department of Employment and Social Development Act* or the rules or regulations made under any of those Acts must file a notice with the Tribunal that sets out
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> (a) the provision that will be challenged;
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> (b) the material facts relied on to support the constitutional challenge; and
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> (c) a summary of the legal argument to be made in support of the constitutional challenge.

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[2] See, for example, section 57 of the *Federal Courts Act*.
[3] Both the Attorney General for the federal government and those for the provinces need to be served the notice.
[4] *Finlay* v. *Canada (Minister of Finance)*, 1986 CanLII 6 (SCC), [1986] 2 S.C.R. 607, at paragraph 28
[5] *Social Security Regulations* SOR/2013-60
[6] *Incremona-Salerno Marmi Affini Siciliani (I.S.M.A.S.) s.n.c.* v. *Castor (The) (C.A.)*, 2002 FCA 479

[9] The Tribunal only has jurisdiction to hear a constitutional challenge against a specific section of one of the Acts that it oversees. It cannot hear a constitutional challenge against a decision of an employer or against any other law. It is therefore important to know, from the outset, which Act, and what section of it, is contested. This is also important for the Attorney General to know what is being challenged.[7]

[10] The notice must also contain the main facts that support the constitutional challenge. The Supreme Court of Canada has said, on many occasions, that a constitutional decision cannot – and should not - be taken in a factual vacuum. [8] There must therefore be a sufficient factual basis to evaluate the context of the constitutional violation and the impact on the person or group affected. It is at the hearing that all the details, the documents and the witnesses will come into play.

[11] Finally, the Regulations require the Appellant to provide a summary of the legal argument he or she intends to bring forward. This is a new requirement. The last version of the Regulations, at subsection 20 (1) a) ii), only required an appellant to provide, "any submissions in support of the issue that is raised."[9] Therefore, all that was needed was an explanation of the argument, in laymen's terms, of how the appellant understood his legal case to be. The Tribunal has said that this requirement was not a heavy burden to meet[10]. There was no evaluation of the strength of the legal arguments brought forward by the appellant at this stage – if the submissions were related to the claim, and not frivolous, it was sufficient to meet the requirements.

[12] The new version of the Regulations requires the Appellant to submit "a summary of the legal argument to be made in support of the constitutional challenge." In interpreting this new wording, we must take into consideration the fact that most appellants are not represented and may not use the proper legal terms or explain the applicable legal test in all their nuances.

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[7] *Bekker* v. *Canada*, 2004 FCA 186 at paragraph 9
[8] *Mackay* v. *Manitoba,* 1989 CanLII 26 (SCC), [1989] 2 S.C.R. 357, at pages. 361-62, *British Columbia (Attorney General)* v. *Council of Canadians with Disabilities*, 2022 SCC 27
[9] Section 20(1) a) ii) of the *Social Security Regulations* SOR/2013-60
[10] *R. S.* v *Minister of Employment and Social Development*, 2017 CanLII 84970 (SST, Appeal division)

[13] But the change in the wording of the Regulations does point to the necessity for appellants to present a legal argument that is relevant to their constitutional challenge and that presents at least a sliver of hope of being argued successfully. This should, in most cases, be easy to meet. Courts have said that they will not dismiss a notice unless "it is plain and obvious that the Appellant's constitutional argument has no reasonable chance of success."[11] But it does mean that it is necessary to evaluate if the argument brought forward has at least a minimal chance of success.

[14] If the Tribunal is satisfied that all three requirements have been met, then the Appellant will be permitted to move on to the next step in the Charter challenge process[12].

[15] In the case at hand, there is no issue that the first two requirements of subsection1(1) have been met. The sections of the Act that are being contested are clearly identified and the factual basis is sufficient in the context of this case. What is contested is the sufficiency of the legal argument.

II- The Evolution of the Notices

[16] The Appellant filed his first Notice as part of his appeal to the Tribunal. He was contesting the decision of the Employment Insurance Commission (Commission) to deny him benefits because of misconduct pursuant to subsection 30(1) of the Act.

[17] In his Notice, the Appellant argued that sections 30(1) and 31 of the Act violated sections 2, 7, and 15 of the Charter. He also asked the Tribunal to grant remedies under section 24(1) of the Charter.

[18] A pre-hearing conference was held on October 14, 2022. I explained to the Appellant that the Tribunal does not have the jurisdiction to decide on the validity of the Federal Government's vaccination mandate, his employer's vaccination policy or the

[11] *FU2 Productions Ltd.* v. *The King*, 2022 TCC 148 at paragraph 34; *Director of Public Prosecutions* c. *Jetté*, 2022 QCCQ 8113 at paragraphs 15, 29 and 30
[12] Which is the filing of a detailed Charter Record that includes all of the evidence, submissions and authorities the claimant intends to rely on.

refusal of his employer to accommodate him. I also explained that the Tribunal does not have the jurisdiction to grant damages under section 24(1) of the Charter. The Tribunal only has jurisdiction to declare a section of the Act or of a regulation inapplicable under s.52 of the Charter.

[19] The Appellant did not agree with the Tribunal's decision and maintained that I had jurisdiction. The parties agreed to plead this issue in writing. One month was given to each party to submit their arguments, and one more month was given to the Appellant to reply[13].

[20] In the document sent[14], the Appellant made new submissions about the constitutional validity of sections 30(1) and 31 of the Act.[15] He now argued that those sections must be "declared unconstitutional because "misconduct" is not defined in the Act or its Regulations (…)[16] and is too vague. He rests this argument on the constitutional principle of the rule of law and the doctrine against vagueness.

[21] The Respondent argued in its response[17] that the Appellant's Notice was insufficient because, essentially, it did not outline a violation of either subsection 2(a) or section 7 of the Charter in sufficient details to meet the requirements of the Regulations. Also, the Respondent submitted that because the Appellant had not identified which section 7 rights had been violated, he could not raise the issue of vagueness in relation to it.[18] Furthermore, if he wanted to invoke the issue of vagueness at the section 1 stage of the Charter analysis, the Tribunal would have to assume a section 7 violations, which it cannot do.[19]

[22] The Appellant replied on January 24, 2023, by submitting an Amended Notice.[20] In it, he still challenges the constitutionality of section 30(1) and 31 of the Act. This has

[13] See GD12
[14] See GD14
[15] GD14-8 to GD14-12 (Part Four)
[16] GD14-3
[17] See GD-15
[18] GD15-5
[19] GD15-6
[20] GD18

not changed. But he is no longer relying on sections 2 or 7 of the Charter or on any other specific section of the Charter. He is also no longer contesting the policy put in place by his employer or that he was not accommodated.

[23] He is now relying *solely* on the rule of law doctrine and the doctrine of vagueness as being "essential elements of the Canadian constitution, independent of the Charter".[21] He argues that it can therefore be used independently to challenge the constitutional validity of a section of the Act.[22]

III – Argument of both parties re: vagueness as an autonomous constitutional argument

[24] After having carefully reviewed the submissions of both parties[23], I advised them that I would hold a hearing on the specific question of the possibility of invoking the doctrine of vagueness without invoking a violation of section 7 of the Charter. I also asked the parties to send me the list of authorities they intended to rely on at least two weeks before the hearing on this very specific issue. Both parties sent me a list of more than 12 decisions[24], not all of which were pleaded at the case-management conference.

Submissions by the Appellant

[25] The Appellant had already filed some submissions on this issue in his Amended Notice[25]. He submits that the doctrine against vagueness forms part of the principle of fundamental justice, which itself is part of "the basic tenets of our legal system."[26]

[26] At the hearing, he argued that the doctrine of vagueness is inherent to the rule of law and that it can be raised in situations where the rights protected by section 7 of the

[21] GD18-6
[22] GD18-4 to GD18-8
[23] See paragraph 11 above.
[24] The Appellant also sent in a few more decisions two days before the hearing and a delay was given to the Respondent to comment on those.
[25] GD18
[26] GD18-7

Charter are not in issue. Even if I have reviewed all the decisions that were submitted, it is not necessary to go through them all here.

[27] The Appellant relied first on *R.* v. *Nova Scotia Pharmaceutical Society*, [27] the leading authority on vagueness, although in the context of section 7 of the Charter. In this decision, the Supreme Court of Canada stated that the issue of vagueness is part of the rule of law because a law that is too vague does not give enough guidance to citizens on how to act. It can be raised both while deciding if the rights protected by section 7 have been infringed or while applying the Oakes test at the section 1 stage.[28]

[28] He also relied on *Kelowna Mountain Development Services Ltd.* v. *Central Okanagan (Regional District)*[29]. This was a challenge to a municipal bylaw where no Charter argument was raised. In its decision, the Court of Appeal explains the main principles relating to vagueness in the municipal context.[30] It decided that the issue of determining if a provision of a law is capable of interpretation is a different issue than the actual interpretation and application of the law in a specific case. The first issue (being capable of interpretation) refers to vagueness.[31] If a section of a law cannot be interpreted because it is too vague, then it must be voided.

[29] The Appellant referred the Tribunal to other decisions to the same effect. It is not necessary to refer to them in detail here. They showed three things : first, the concept of vagueness has been used to invalidate certain dispositions in municipal law. Second, the rule against vagueness is part of the rule of law, which is an important (unwritten)

[27] *R.* v. *Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 SCR 606. In this case, section 7 of the Charter was in issue.
[28] See pp 626 and 627 of the decision.
[29] *Kelowna Mountain Development Services Ltd.* v. *Central Okanagan (Regional District)*, 2014 BCCA 369
[30] *Kelowna Mountain Development Services Ltd.* v. *Central Okanagan (Regional District)*, 2014 BCCA 369 at paragraph 17
[31] *Kelowna Mountain Development Services Ltd.* v. *Central Okanagan (Regional District)*, 2014 BCCA 369 at paragraph 18

constitutional principle. Third, the concept of vagueness has been raised in some non-Charter context, although with limited success.[32]

Submissions by the Respondent

[30] The Respondent's essential argument is that vagueness can be raised in civil cases when interpreting definitions in a bylaw or a regulation, or in a constitutional challenge in relation to the violation of a Charter right. But that it cannot be invoked before the Tribunal as a stand-alone way of attacking the constitutional validity of a section of the Act. To this effect, they referred me first to *Vanguard Coatings and Chemicals Ltd.* v. *M.N.R.*,[33] at pages 397 and 398, where the Court says that it does not have the power to declare a section of an act void for uncertainty.

[31] The Respondent then referred me to *Toronto (City)* v. *Ontario (Attorney General)* (*City of Toronto*),[34] a recent Supreme Court of Canada decision. In this decision, the Court discusses[35] the role and impact of unwritten constitutional principles[36], the rule of law being one of those principles.[37] The majority of the Court is of the opinion that unwritten constitutional principles cannot be used to invalidate a law.[38] They state that those principles can only be used in two ways : 1- as an aid in the interpretation of constitutional provisions and 2- as a way to "develop structural doctrines unstated in the written Constitution *per se*."

[32] The other decisions listed by the Respondent were all rendered before *City of Toronto,* and I will not review them in detail here.

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[32] See for example *Groupe La Québécoise inc.* c. *Procureur général du Québec*, 2023 QCCA 227 (CanLII). The Appellant refers the Tribunal to paragraph 12, to show the concept had been raised. But what is more important to notice is that the Court of Appeal, at paragraph 13, says the concept does not apply to the case under review.
[33] *Vanguard Coatings and Chemicals Ltd.* v. *M.N.R.*, 1986 CanLII 6788 (FC), [1987] 1 FC 367
[34] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34
[35] I must mention that this is a very complex decision, where the justices where split 5 to 4.
[36] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraphs 49 to 63
[37] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 49
[38] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 63

IV- Analysis – can vagueness and the rule of law be argued in a constitutional challenge when no Charter argument is being raised?

a) Unwritten constitutional principles

[33] I must start this analysis by stating that the issue I have to decide at this stage is not : is the term “misconduct” unconstitutionally vague? but rather is: can the rule of law, and the principle against vagueness, be used to declare constitutionally invalid a section of the Act when no Charter rights is being invoked?

[34] The answer to this question is no. The Supreme Court of Canada, in *City of Toronto*, has clearly said that it cannot. I will review this decision and then explain why I am bound by it.

[35] The context in City of Toronto is that of a provincial law, passed in the middle of the municipal election process, reducing the number of wards by nearly half. The city and other groups contested the law on two bases: first, because it infringed on the freedom of expression protected by section 2b) of the Charter and second, because it violated the unwritten constitutional principle of democracy. Five judges, including the Chief Justice, dismissed the appeal.

[36] I will not review the reasoning on the freedom of expression question since it is not at issue in this appeal. I will only deal with the question of unwritten constitutional principles. It is important to note that even if it was the principle of democracy that was at issue in City of Toronto, the Court’s reasoning is applicable to all unwritten constitutional principles.[39]

[37] First, what exactly are “unwritten constitutional principles”? Our constitution is a combination of “written and unwritten norms.”[40] The unwritten norms, like the principle of democracy, the rule of law or the principle of fundamental justice, are essentially the “context and backdrop to the Constitution’s written terms[41]." Said in other words, they

[39] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraphs 49 to 63
[40] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 49
[41] *Toronto (City)* v. *Ontario (Attorney General),* 2021 SCC 34 at paragraph 50

form the architecture, the structure that can help in the analysis and interpretation of the written rights, freedoms and other norms found in the Charter and in the Constitution[42].

[38] After explaining what, in their opinion, can unwritten constitutional principles be used for, the court concludes this way: “In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation.”[43] This settles the matter.

b) *Stare decisis*

[39] I am bound by this decision because of what is called “vertical *stare decisis*”.[44] This simply means that lower courts (including administrative tribunals) are bound to follow decisions of higher courts.[45] Because the Supreme Court of Canada is the highest court in our country, I am bound to follow its decisions when it has ruled on a question that is the same as the one before me. Again, since the Supreme Court of Canada gave a clear and unambiguous answer to that question, I am bound to follow it.

[40] This also explains why I am not dealing expressly with the other decisions cited by the Appellant. Since they all preceded the Supreme Court’s decision, they cannot be relied on as valid precedents if they give a different answer than the one given by our highest court.

[41] This means that the Appellant’s argument, as framed at this point, has *no* chance of success. It also means that it cannot constitute a “legal argument to be made in support of”[46] the constitutional challenge raised, which is the third element required for a Notice of Constitutional Question to be valid. The legal argument brought forth by the Appellant cannot support the constitutional challenge because the highest court has

[42] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 55
[43] *Toronto (City)* v. *Ontario (Attorney General)*, 2021 SCC 34 at paragraph 63
[44] *R.* v. *Sullivan*, 2022 SCC 19 at paragraph 65
[45] *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101 at paragraph 42; *Carter* v. *Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 SCR 331 at paragraph 43 where the Court says that precedents must be followed “rigidly”.
[46] Subparagragh 1(1) c) of the Regulations

said that it cannot do what the Appellant wants it to do. Therefore, I must conclude that the Notice is insufficient to support a constitutional challenge.

Conclusion

[42] The Appellant's Amended Notice includes properly identified provisions in the Act and sufficient facts to meet the requirements of subsection 1(1) of the Regulations. But it does not provide the outline of a valid constitutional argument.

[43] I therefore find that his Amended Notice does not comply with the requirements of subsection 1(1) of the Regulations and is therefore insufficient to raise a constitutional issue before the Tribunal.

[44] The Appellant's appeal will now continue as a regular appeal.

[45] The parties will be advised of the next steps in due course.

Nathalie Léger
Member, General Division – Employment Insurance